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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION  
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IN THE MATTER OF US WEST COMMUNI-  
CATIONS, INC.'S COMPLIANCE WITH  
§ 271 OF THE TELECOMMUNICATIONS  
ACT OF 1996

Docket No. T-00000A-97-<sup>0238</sup>~~238~~

COMMENTS OF THE  
ASSOCIATION OF COMMUNICATIONS ENTERPRISES  
REGARDING QWEST CORPORATION'S COMPLIANCE WITH THE  
PUBLIC INTEREST REQUIREMENTS OF SECTION 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996

The Association of Communications Enterprises ("ASCENT"),<sup>1</sup> on behalf of its members, submits its comments regarding the public interest standard of Section 271(d)(3)(C) of the Telecommunications Act of 1996 (hereafter the "Telecommunications Act"). ASCENT requests that these comments be included in the Commission's record in this docket. It is in the Commission's interest to receive information on relevant 271 issues

<sup>1</sup> ASCENT, formerly the Telecommunications Resellers Association, is the international trade organization representing the interests of advanced communications firms. ASCENT's more than 600 companies and individuals members provide voice and data services including Internet access, high-speed transport, local and long distance phone service, application services, and wireless products. Founded in 1992 and headquartered in Washington, D.C., ASCENT's mission is to open all communications markets to full and fair competition and to help member companies' design and implement successful business plans. ASCENT strives to assure that all service providers, particularly entrepreneurial firms, have the opportunity to compete in the communications arena and have access to critical business resources. Numerous ASCENT members are certificated to provide competitive telecommunications services in Arizona.

from as many affected parties as possible and from as many different viewpoints as possible. Due to its membership, *ASCENT* presents a somewhat different view than those parties that have participated in this docket to date.<sup>2</sup> Moreover, *ASCENT* also requests that these comments be considered in the ongoing workshop on the public interest standard. Because this Commission has not yet reached a resolution on the public interest standard, *ASCENT* believes it is important that the Commission hear from smaller CLECs that do not have the resources to fully participate in the time consuming 271 workshops. *ASCENT* certainly would expect that Qwest would be given the opportunity to respond to these comments. The timing of this filing also should not prejudice Qwest because these comments are not significantly different from *ASCENT*'s comments in the Colorado 271 workshops (to which Qwest has already responded.) Moreover, *ASCENT* understands that substantial amounts of information already has been "imported" into the Arizona 271 workshops from Qwest 271 proceedings in other states. Qwest should, therefore, have no objection to the submission of *ASCENT*'s Comments at this juncture.

The relevant testimony filed by Qwest Corporation ("Qwest") consists of the Affidavit of David L. Teitzel, April 17, 2001 (which is nearly identical to his testimony in Colorado). *ASCENT* maintains that Qwest has not met its burden for demonstrating compliance with the public interest standard for in-region interLATA market entry, nor its broader market opening obligations under section 271 of the Telecommunications Act of 1996.

## INTRODUCTION

In the more than three years since Qwest first sought Arizona Corporation Commission ("Commission") support for its entry into Arizona's long distance market,

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<sup>2</sup> *ASCENT*'s comments on resale of ILEC advanced services (*see below* at pp. 14-17) are particularly timely and relevant given the recent affirmation of the D.C. Circuit's January 2001 decision requiring such resale. *See Association of Communications Enterprises v. FCC*, 235 F.3d 662, 663 (D.C. Cir.), *aff'd*, - F.3d -, No. 00-1144 (D.C. Cir. June 26, 2001.)

Qwest has made incremental, if not measured, progress in opening the local market monopoly in Arizona to competitive entry. Such limited strides in opening Arizona's local markets to competition cannot, however, overcome the significant burden that Qwest must undertake in demonstrating that it has met its full obligations under Section 271(c) of the Telecommunications Act in fact rather than in promise, before being allowed to enter Arizona's long distance market. As detailed below, those full obligations include an obligation on Qwest to demonstrate that the public interest will be served by its entry into the long distance market. *ASCENT* maintains that Qwest has not met that burden, consistent with its failure to demonstrate compliance with the competitive checklist for in-region interLATA market entry.

Ultimately, the fundamental question that first this Commission, and then the U.S. Department of Justice ("DOJ") and the Federal Communications Commission ("FCC") must answer, is whether Qwest has fully and irreversibly opened the local telecommunications market in Arizona to competition for both business and residential customers via the three modes of entry contemplated by the Telecommunications Act, and by the existence of appropriate operations support system ("OSS") systems, performance measures and appropriate remedies. *ASCENT* submits that in order for the Commission (and then DOJ and the FCC) to answer this pivotal question, the Commission must consider Qwest's compliance record as well as the experience of Qwest's competitors and the general availability of local competition in the State. The Commission's evaluation must, therefore, be factually based rather than based on Qwest's promises of availability and compliance.

To date, a preponderance of the evidence on which Qwest has relied in this docket has been based on future promise of compliance and on the establishment of general policies and procedures that do not conclusively support a determination that Qwest has met its compliance obligations. There remains a dearth of evidence that competitive local exchange carriers ("CLECs"), such as many of *ASCENT*'s members, are able to receive the

1 non-discriminatory access to interconnection, unbundled network elements, wholesale  
2 services, and access to OSS in a manner that will allow them to provide *reliable*  
3 competitive local services to Arizona consumers. If anything, CLEC parties in this  
4 proceeding have raised a continuing series of problems and concerns over Qwest's  
5 provision of interconnection, services, and support, in fact, which today prevent the public  
6 from switching local providers as easily as they may switch interexchange providers.

7 Qwest's testimony in support of its compliance with Section 271's public interest  
8 standard continues a disturbing trend of relying on future promises rather than  
9 demonstrated and current market conditions. As might be expected, Qwest focuses its  
10 attention on the purported benefits of *its* entry into an already competitive interexchange  
11 market. Yet despite Qwest's claims that future benefits are sure to occur if it is allowed to  
12 enter the long distance market in Arizona, the reality remains that competitors continue to  
13 make only negligible inroads into a limited number of local markets in the state, and  
14 continue to struggle at every turn. In the absence of evidence demonstrating both Qwest's  
15 sustained performance in meeting market-opening obligations, and a robust and thriving  
16 competitive local market, this Commission cannot accurately assess Qwest's compliance  
17 on the basis of the speculative assurances and promises of future benefits that Qwest makes  
18 and relies on to demonstrate that the public interest will be served by its long distance  
19 entry. Until a record of sustained compliance by Qwest has been compiled and evaluated,  
20 it cannot be found that the public interest standard of Section 271 has been met.

21 **1. The Telecommunications Act Mandates a Broad Public Interest**  
22 **Inquiry Prior to Grant of Section 271 Authority.**

23 Section 271(d)(3) of the Telecommunications Act provides that the Federal  
Communications Commission ("FCC") "shall not approve [a BOC application to provide  
in-region, interLATA services] . . . unless it finds that -(A) the petitioning [BOC] has . . .  
fully implemented the competitive checklist . . . ; and (C) the requested authorization is  
*consistent with the public interest, convenience, and necessity*" (emphasis added). FCC

1 decisions on Section 271 applications have made clear that the public interest inquiry must  
2 be a broad one, *and* that the public interest requirement is “a separate, independent  
3 requirement for entry.” In re Application by Ameritech Michigan to Section 271 of the  
4 Telecommunications Act of 1934, as amended, to Provide In-Region InterLATA Service in  
5 Michigan, CC Docket 97-37, FCC 97-298 (August 19, 1997) (hereafter “Ameritech  
6 Michigan Order”), at paras. 385, 389. The FCC deliberately has left details of the public  
7 interest standard largely undefined, choosing instead to emphasize that “the presence or  
8 absence of any one factor will not dictate the outcome of our public interest inquiry.” Id. at  
9 para. 391. At the same time, the FCC has taken pains also to emphasize what factors may  
10 *not* be relied on by the RBOC as conclusive demonstration that the public interest standard  
11 has been met.

12 In making a public interest assessment, for example, the FCC has ruled that  
13 regulators cannot “conclude that compliance with the checklist alone is sufficient to open a  
14 BOC’s local telecommunications markets to competition,” because “[*s*]uch an approach  
15 would effectively read the public interest requirement out of the statute, contrary to the  
16 plain language of Section 271, basic principles of statutory construction, and sound public  
17 policy.” Id. at para. 389 (emphasis added). Moreover, the public interest inquiry is not to  
18 be “limited narrowly to assessing whether BOC entry would enhance competition in the  
19 long distance market.” Id. at para. 386. Rather, as articulated by the FCC:

20 Although the competitive checklist prescribes certain minimum  
21 access and interconnection requirements necessary to open the  
22 local exchange to competition, we believe that compliance with  
23 the checklist will not necessarily assure that all barriers to entry  
to local telecommunications market have been eliminated, or  
that a BOC will continue to cooperate with new entrants after  
receiving in-region, interLATA authority. While BOC entry  
into the long distance market could have procompetitive effects,  
whether such benefits are sustainable will depend on whether  
the BOC’s local telecommunications market remains open after  
BOC interLATA entry. Consequently, we believe that we must

consider whether conditions are such that the local market will remain open as part of our public interest analysis.

Id. at para. 390.

Like the FCC, the DOJ also views the broad public interest standard in the Telecommunications Act as an important component in the evaluation of a BOC's application for long distance authority. As DOJ has stated:

The "public interest" standard under the Communications Act is well understood as giving the Commission the authority to consider a broad range of factors and the courts have repeatedly recognized that competition is an important aspect of the standard under federal telecommunications law.

Evaluation of the United States Department of Justice, Federal Communication Commission, In re Application of SBC Communications, Inc. et al. for Provision of In-region InterLATA Services in Oklahoma, CC Docket No. 97-121, filed May 16, 1997 (hereafter referred to as "DOJ SBC Comments"), at p. 39. And like the FCC, the DOJ has stressed the distinction between the minimum conditions set forth in Section 271's competitive checklist, and the broader public interest test:

Congress supplemented the threshold requirements of Section 271, . . . with a further requirement of pragmatic, real world assessments of the competitive circumstances by the Department of Justice and the Commission. Section 271 contemplates a substantial competitive analysis by the Department, using any standards the Attorney General considers appropriate. The Commission, in turn, must find before approving an application that the "requested authorization is consistent with the public interest, convenience, and necessity," and, in so doing, must "give substantial weight to the Attorney General's evaluation." The Commission' "public interest" inquiry and the Department's evaluation thus serve to complement the other statutory minimum requirements, but are not limited by them.

In vesting the Department and the Commission with additional discretionary authority, Congress addressed the significant concern that the statutory entry tracks and competitive checklist

1 could prove inadequate to open fully the local telecommuni-  
2 cations markets.

3 Id. at p. 38.

4 The DOJ also has addressed the weight to be given to claims by the BOCs of public  
5 interest benefits to the long distance market if Section 271 authority is granted to the BOC.  
6 As stated in the DOJ SBC Comments, at p. 4:

7 InterLATA markets remain highly concentrated and  
8 imperfectly competitive, however, and it is reasonable to  
9 conclude that additional entry, particularly by firms with the  
10 competitive assets of the BOCs, is likely to provide additional  
11 competitive benefits.

12 But Section 271 reflects Congressional judgments about the  
13 importance of opening local telecommunications markets to  
14 competition as well. The incumbent local exchange carriers  
15 broadly viewed, still have virtual monopolies in local exchange  
16 service and switched access, and dominate other local markets  
17 as well. Taken together, the BOCs have some three quarters of  
18 all local revenues nationwide, and their revenues in their local  
19 markets are twice as large as the net interLATA market  
20 revenues in their service areas. Accordingly, more considerable  
21 benefits could be realized by fully opening the local market to  
22 competition."

23 The DOJ continued by noting that:

Section 271 reflects Congress' recognition that the BOCs  
cooperation would be necessary, at least in the short run, to the  
development of meaningful local exchange competition, and  
that so long as a BOC continued to control local exchange  
markets, it would have the natural economic incentive to  
withhold such cooperation and to discriminate against its  
competitors. Accordingly, Congress conditioned BOC entry on  
completion of a variety of steps designed to facilitate entry and  
foster competition in local markets.

And like the FCC, the DOJ has not specified a precise standard to be used when  
making a public interest analysis. Rather, DOJ stresses the importance of "meaningful,"  
"substantial," and "irreversible" competition:

SBC does not presently face substantial local competition in Oklahoma, despite the potential for such competition and the expressed desire of numerous providers, including some with their own facilities, to enter the local market . . . . SBC's failure to provide adequate facilities, service and capabilities for local competition is in large part responsible for the absence of substantial competitive entry. If SBC were to be permitted interLATA entry at this time, its incentives to cooperate in removing the remaining obstacles to entry would be sharply diminished, thereby undermining the objectives of the 1996 Act.

In performing its competitive analysis, the Department seeks to determine whether the BOC has demonstrated that the local market has been irreversibly open to competition. To satisfy this standard, a BOC must establish that the local markets in the relevant states are fully and irreversibly open to the various types of competition contemplated by the 1996 Act – the construction of new networks, the use of unbundled elements of the BOC's network, and the resale of BOC services . . . . In applying this standard, the Department will look first to the extent to which competitors are entering the market. The presence of commercial competition at a nontrivial scale both (1) suggests that the market is opening; and (2) provides an opportunity to benchmark the BOC's performance so that regulation will be more effective.

Id. at pp. 41-42.

As detailed below, Qwest's public interest testimony in this docket, which consists only of Mr. Teitzel, relies almost exclusively on the exact factors that the FCC and the DOJ have rejected as being dispositive to the public interest inquiry.

**2. Qwest's Attempt to Reduce the Public Interest Standard to Compliance with the Competitive Checklist is Contrary to FCC Rulings and Such Discussion is Irrelevant to This Workshop.**

Despite the express language of the FCC's Michigan Order, Qwest's prefiled testimony repeatedly suggests that Qwest's application should be deemed as meeting the public interest criterion because, Qwest asserts, at the conclusion of all the workshops,



Qwest will be found to have met the competitive checklist. [See, e.g., Affidavit of David L. Teitzel, Filed April 17, 2001 (“*Teitzel Affidavit*”) at 39]<sup>3</sup> Qwest’s reasoning is not only circular but is contrary to the clear statements cited above from the FCC’s Michigan Order. Not only is a showing of checklist compliance insufficient to demonstrate that long distance entry is in the public interest, but, Qwest’s purported showing of checklist compliance continues to rely *almost exclusively* on the *future* availability of interconnection, network elements, and services as promised in Qwest’s SGAT, rather than actual factual evidence demonstrating that it presently complies with the statutory conditions for entry.

Qwest continues to emphasize paper promises of future compliance through proposed SGAT language, hoping that the results of operations support system (“OSS”) testing will reveal a stellar compliance record. CLEC participants to this docket, however, have testified about the existence of various ongoing practices and policies of refusal, delay and discrimination by Qwest in mis-implementation of its legal obligations to provide interconnection, unbundled network elements, services, and support. Qwest has been unable to demonstrate on the record of these workshops that it can or will confront and remedy these “real world” practices that smother the development of genuine competition in Arizona.

The reality is that Qwest’s wholesale customers continue to be forced to struggle against a myriad of unnecessary and unjustified, Qwest-imposed impediments to genuine market entry and sustainable competitive counterbalance to Qwest’s market dominance. In the absence of evidence demonstrating sustained Qwest performance in meeting its market-opening obligations, Qwest’s speculative assurances of future compliance with the

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<sup>3</sup> Qwest’s 13-point “demonstration” that its local markets are open to competitors in Arizona demonstrate only the potential for competition and not “actualized” or present competition – a fallacy underlying Qwest’s case in this proceeding. [See *Teitzel Affidavit* at 39-41]

1 checklist requirements clearly are patently insufficient for this Commission to find that the  
2 public interest will be served by in-region interLATA entry by Qwest. And the existence  
3 of a performance assurance plan, as Mr. Teitzel suggests, is insufficient by itself to ensure  
4 compliance, as evident by regional Bell operating company continued substandard  
5 performance.<sup>4</sup>

6 **3. In a Sleight of Hand, Qwest Emphasizes Purported Future**  
7 **Benefits to the Long Distance and Local Markets if Qwest Is**  
8 **Granted In-Region InterLATA Authority While Ignoring the**  
9 **Dearth of Meaningful Competition in Local Markets.**

10 Mr. Teitzel's public interest testimony offers a discussion of how, in his opinion, the  
11 long distance industry will be improved if Qwest is allowed to provide in-region long  
12 distance services. As noted above, alleged benefits to the long distance market are  
13 insufficient to prove that long distance entry by the BOC is in the public interest. To be  
14 sure, Qwest also recites some additional benefits that will flow to *itself* if it is granted  
15 Section 271 authority. [See, e.g., *Teitzel Affidavit* at 51] Certainly no one will dispute that  
16 Qwest will benefit from Section 271 approval; however, just as certainly such benefits to  
17 Qwest are self-serving and irrelevant to the Commission's inquiry herein, and can in no  
18 way be considered in the *public* interest. Moreover, Qwest ignores the larger benefits of  
19 price competition in local markets.

20 The myriad of benefits Qwest stresses with respect to its entry into the interLATA  
21 market, should already exist – but do not – for competitors in the local market, if one  
22 follows Qwest's logic. Local service pricing should be reduced. [*Teitzel Affidavit* at 48] It

23 <sup>4</sup> For example, BellSouth Telecommunications, Inc. ("BellSouth") in mid-July paid the Georgia Public Service Commission, a \$4.5M fine for failing to meet Commission performance measures for the three-month period of March, April, and May 2001. These penalties are exclusive of an additional \$7M in penalties associated with BellSouth's failure to meet local number portability performance measures. The existence of performance measures and penalties offer no performance guarantee, and are, of course, retroactive in nature, penalizing the incumbent *after* the damage is done. See, e.g., Performance Measurements for Telecommunications Interconnection, Unbundling and Resale, Georgia Public Service Commission, Docket No. 7892-U.

1 is not. Qwest claims that interexchange customers today risk having "a narrower range of  
2 service options, particularly in those less competitive areas" if Qwest is not authorized to  
3 enter the interLATA market. [*Teitzel Affidavit* at 49] Yet Qwest's Arizona customers  
4 currently face a narrower range of local service options, particularly in less competitive  
5 areas, because Qwest's markets are not yet open to competitors.

6 Qwest uses its shop worn "cherry picking" argument in suggesting that competitors  
7 elect to serve only the most lucrative of subscribers. [*Teitzel Affidavit* at 49] Yet Qwest  
8 offers no evidence of its own targeted market entry strategies in other regions, or of its  
9 efforts to offer local services outside of its current local service area in competition with  
10 other regional Bell operating companies. Can Qwest be trusted not to engage in the same  
11 behavior it claims competitors engage in? More importantly, assuming *arguendo*, that  
12 Qwest is correct, its allegations are entirely irrelevant to any demonstration that its local  
13 markets have been opened to competition. The dubious success of *any* CLEC in Qwest  
14 markets to date is a strong indicator that Qwest's markets are not open to competition  
15 regardless of the type of customer targeted by competitors. Qwest does not point to any  
16 successful local competitors, because lamentably, it cannot.

17 Also from Qwest's regulatory playbook comes another well used argument for  
18 regulatory parity. [*Teitzel Affidavit* at 51] The ultimate fallacy of this argument, of  
19 course, is that there can be no regulatory parity if there is no competitive parity, as is the  
20 case when Qwest remains the dominant local carrier and exercises its dominance every day  
21 to the detriment of its competitors.

22 Qwest has its competitive arguments backwards. If the local market was truly open  
23 to competition, consumers for local as well as long distances services would *today* be  
enjoying the price reductions and competitive benefits that Qwest promises will come  
sometime in the future, post-271 approval. In *ASCENT's* view, it is not the absence of  
Qwest as a long distance competitor, but rather the absence of meaningful competitive

entry in the local market: a strong indicator that Qwest has not yet truly opened its local market to competition.

Qwest also surmises on the future benefits to local competition that, in its view, can be anticipated to flow if it obtains Section 271 authority, arguing in essence that local competition will come to Arizona only after Qwest is allowed into the long distance market. [*Teitzel Affidavit* at 52] Again, this testimony ignores the fact that Qwest is required to demonstrate that it has met its full obligations under Section 271 *in fact* rather than in promise. Until Qwest's competitors can aver to their *present* ability to provide service to the public at parity with Qwest, Qwest's claims of future benefits remain simply conjecture, not based on a solid foundation of fact. Moreover, Qwest's testimony of future benefits does nothing to demonstrate that the Arizona market is currently and *irreversibly* open to competition. And clearly, despite Qwest's self-serving opinions to the contrary, premature entry by Qwest into the long distance market, before the market has been irreversibly open to competition, will not facilitate the growth of local competition, but rather will stifle competition in both the local and long distance markets.

In *ASCENT's* view, premature long distance entry undoubtedly will result in Qwest capturing long distance market share, as Qwest asserts, but it also undoubtedly will eliminate Qwest's incentives to open, and keep open, the local market. Qwest turns the public interest argument on its head by asking this Commission to believe that the entry of an entity that will leverage its local market dominance to compete in an effectively competitive interexchange market will somehow benefit consumers in both markets. The irony of this argument should not escape the Commission.

1           **4.       Qwest's Local Competition Statistics Fail to Demonstrate That**  
2           **Qwest Is Providing Nondiscriminatory Access to Resale,**  
3           **Unbundled Network Elements, Advanced Services, Inter-**  
4           **connection, and Operations Support Systems at Parity.**

5           Mr. Teitzel's testimony highlights statistics that, in its view, purport to show how  
6           competitive the local market is in Arizona. Such statistics include Qwest's calculations as  
7           to the number of access lines being served by competitors; the number of interconnection  
8           agreements that have been executed by Qwest in Arizona; the minutes of use that have  
9           been exchanged with competitors; the number of carriers that are reselling Qwest's  
10          services; and the number of unbundled loops that have been provisioned, as demonstrative  
11          of the level of local competition in Arizona.

12          *ASCENT* and its primarily small-carrier members do not have the resources to  
13          independently validate the figures provided by Qwest in Mr. Teitzel's testimony. As even  
14          cursory reading of news reports of the past few months reveal, however, the CLEC  
15          industry has suffered significant setbacks recently. Data recently accumulated by QSI  
16          Consulting, for example, demonstrate that CLEC and wholesale provider market  
17          capitalization have fallen nearly 69% in the period December 1999 through April 2001.  
18          These data hardly paint a picture of robust local competition.<sup>5</sup> It is unclear – but appears  
19          unlikely – that Mr. Teitzel's data has been updated to reflect *current* carrier participation in  
20          the Arizona market. And absent such an action, the data cited by Qwest is outdated and of  
21          little other than historical interest or usefulness. But more importantly, even assuming  
22          *arguendo* that Qwest's statistics are accurate and current, such statistics prove nothing as to  
23          whether Qwest can, and does, provide adequate facilities, services, and capabilities to its

20                   <sup>5</sup> See Investigation by the Department of Telecommunications and Energy on its own  
21                   Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for  
22                   Unbundling Network Elements and Combinations of Unbundled Network Elements, and the  
23                   Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts'  
                    Resale Services in the Commonwealth of Massachusetts, Massachusetts Department of Telecom-  
                    munications and Energy, Docket No. D.T.E. 01-20, Testimony of Dr. August H. Ankum, Financial  
                    Analysis, Exhibit AHA – 2 (July 2001) (a copy of this exhibit is attached).

1 competitors on a nondiscriminatory basis, at commercial volumes, and over a sustained  
2 period of time.

3 The seriousness of the operational challenges imposed on CLECs by Qwest's often  
4 incompetent, many times overtly discriminatory practices in the marketplace have been  
5 documented on the record in this docket, but are glossed over in the type of data provided  
6 by Qwest. The enormous ordering and provisioning delays caused by Qwest which have  
7 imposed critical time-to-market discriminations and unnecessary use of scarce CLEC  
8 resources are most definitely not captured in the data that Qwest provides in Mr. Teitzel's  
9 testimony. For example, while Qwest provides data as to the number of access lines being  
10 served by CLECs and the number of loops that have been provisioned by Qwest, such data  
11 say nothing about the quality or timeliness of the services or facilities provided by Qwest  
12 in order for CLECs to gain access to those loops or customer lines. For example, Qwest's  
13 data do not mention how many of the reported loops were provisioned on time, or whether  
14 the quality of the loops was acceptable or at parity, or whether the pre-ordering and  
15 ordering systems and processes for those loops functioned properly or at parity; or whether  
16 maintenance and repair was performed by Qwest at parity. Similarly, statistics as to the  
17 number of access lines served by CLECs do not address the number of customers that  
18 CLECs may have lost due to Qwest's wholesale services and support – such as those  
19 customers that cancelled their orders with CLECs for access lines as a result of a missed  
20 installation date or provisioning delays by Qwest. Qwest's data also say nothing about the  
21 service quality of the loops provisioned by Qwest, or about the costs that CLECs had to  
22 incur to resolve provisioning, maintenance, and billing issues. The same flaws are inherent  
23 in Qwest's data on collocations, the provision of interconnection trunks, the exchange of  
traffic, and the provision of resold services. Moreover, without the completion of OSS  
testing and the receipt of final test results and recommendations, any public interest  
analysis performed is necessarily incomplete, as there is no way to verify Qwest's  
performance in the provision of the facilities, services, and processes necessary to sustain a

1 truly competitive market. As argued *infra*, Qwest's statistics reflect potential, and not  
2 actualized, competition.

3 The record amassed in this docket to date demonstrates that repeated CLEC  
4 problems are not isolated instances that can be routinely explained away by Qwest, but  
5 rather are indicative of deeply rooted ineptness and intentional practices of Qwest that  
6 prevent competitors from being served at parity with Qwest and from servicing their end  
7 user customers reliably. When assessing whether the public interest will be served by  
8 granting Section 271 authority to Qwest, it is imperative that this Commission closely  
9 evaluate how competitors are faring in Arizona's local markets and, moreover, their ability  
10 to offer competitive local services at parity with Qwest, when such parity is directly  
11 dependent on incumbent interconnection, unbundled network elements, services, and  
12 support.

13 **5. Qwest's Testimony is Devoid of Any Evidence Demonstrating  
14 Qwest's Compliance with Recent Judicial and Regulatory  
15 Decisions on the Resale of Advanced Services and On The Ability  
16 of CLECs to Offer Advanced Services At Parity With Qwest**

17 It is interesting that Mr. Teitzel's testimony provides virtually no data about the  
18 state of competition in the advanced services market in Arizona. Mr. Teitzel briefly  
19 mentions on page 27 of his testimony that Qwest has interconnection agreements with  
20 some data CLECs in Arizona that "mainly purchase digital unbundled local loops from  
21 Qwest." However, the statistics provided later in Mr. Teitzel's testimony concerning the  
22 number of unbundled loops provided by Qwest do not specify how many of those loops are  
23 line shared loops, line split loops, or DSL capable loops. Qwest's testimony therefore  
completely fails to demonstrate that it is providing, or is even capable of providing, line  
shared, split line, and DSL capable loops at commercial volumes.

Qwest also fails to make any showing whatsoever as to its provision of advanced  
services on a resale basis. The statistics in Mr. Teitzel's testimony on the number of

carriers providing resold services in Arizona, and on the number of access lines being resold, also do not specify whether any such carriers are reselling Qwest's advanced services. The law and FCC recent pronouncements are clear, however, that Qwest and its affiliates are required to offer resold DSL services to CLECs. Qwest's lack of evidence as to its non-discriminatory provision of advanced services on a resold basis therefore not only mandates a finding that Qwest has not made the requisite public interest showing, but it also casts doubt on Qwest's compliance with Checklist Item 14 – which requires that Qwest fully implement the resale obligations of Section 251(c)(4) for advanced services such as DSL, and Checklist Item 2, which requires, among other things, that Qwest provide nondiscriminatory access to OSS for CLECs to provide resold DSL services.

The January 2001 decision of the U.S. Court of Appeals for the D.C. Circuit has made clear that "Congress did not treat advanced services differently from other telecommunications services" with respect to the resale obligations of Section 251(c)(4) of the Telecommunications Act. Association of Communications Enterprises v. FCC, 235 F.3d 662, 663 (D.C. Cir.), aff'd, -- F.3d --, No. 00-1144 (D.C. Cir. June 26, 2001) (hereafter "*ASCENT*").<sup>6</sup> The FCC has indicated that it will review compliance with the *ASCENT* decision in future 271 applications. In the SBC Kansas 271 Order, issued on January 23, 2001, the FCC noted the *ASCENT* decision, and stated that while Southwestern Bell Telephone Company could not be faulted for complying with the Commission rules in effect at the time of the application, "we expect SWBT to act properly to come into compliance with section 251(c)(4) in accordance with the terms of the court's decision." In re Joint Application by SBC Communications, Inc. et al. for Provision of In-Region

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<sup>6</sup> On review, the Court declined to find that sale of DSL services by an incumbent to an Internet Services Provider constitutes retail sales for the purposes of triggering the Act's wholesale obligations. This finding has no bearing on the ultimate conclusion reached in the first *ASCENT* decision, that incumbents must offer advanced services for resale in compliance with Section 251(c) of the Act.



1 InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum  
2 Opinion and Order, FCC 01-29 (January 22, 2001), at para. 252, n.768.

3 Accordingly, the FCC has put both the BOCs, and the state commissions, on notice  
4 that compliance with the obligation to resell DSL services will be a prerequisite to future  
5 271 applications.

6 Even more recently, the DOJ, in its evaluation of SBC's Missouri 271 application  
7 (which has since been withdrawn from FCC consideration), raised concerns about the  
8 implementation of the *ASCENT* decision. In its May 9, 2001 evaluation, the DOJ 'urge[d]  
9 the Commission to thoroughly investigate whether SBC is complying with its resale  
10 obligations" in the wake of the *ASCENT* decision. In re Application of SBC  
11 Communications Inc. et al. for Provision of In-Region, InterLATA Services in Missouri,  
12 CC Docket 01-88, Evaluation of the United States Department of Justice, p. 21. And just  
13 last week, the FCC held Verizon and its advanced services affiliate, Verizon Advanced  
14 Data, Inc. ("VADI") to the unconditioned resale of advanced services, concluding,

15 In light of the *ASCENT* decision, we cannot accept Verizon's  
16 contention that it is not required to offer resale of DSL unless  
17 Verizon provides voice service on the line involved. As an  
18 initial matter, we reject this argument based on the plain  
19 language of section 251(c)(4) . . . Verizon and VADI, which are  
20 subject to the same resale obligations, currently provide local  
21 exchange and DSL services to retail customers over the same  
22 line. Therefore, we find that, because Verizon and VADI offer  
23 these services on a retail basis, these services are eligible for a  
24 wholesale discount under section 251(c)(4). Accordingly, we  
25 conclude that Verizon must make available to resellers, at a  
26 wholesale discount, the same package of voice and DSL  
27 services that it provides to its own retail end-user customers.  
28 [Footnotes in original omitted.]

21 In the Matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon  
22 Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for

1 Authorization to Provide In-Region, InterLATA Services in Connecticut, CC Docket No.  
2 01-100, FCC 01-208 (rel. July 20, 2001) at para. 30.

3 Qwest clearly must be required to demonstrate that it complies with the obligation  
4 to provide advanced services on a resale basis, both currently and on a going-forward basis.  
5 As this Commission is well aware, the demand for advanced services such as DSL is  
6 rapidly growing. CLECs are attempting to incorporate advanced services into their own  
7 service offerings throughout the country. The availability of a viable DSL-resale offering  
8 would more easily allow CLECs to bundle this offering with their own voice services and  
9 even perhaps with their own ISP provider. Quite simply, the availability of such a resale  
10 DSL offering will allow more CLECs to complete a "bundled" package of voice, Internet  
11 access, and DSL, and the lack of availability of a resale DSL offering will enable Qwest to  
12 perpetuate its dominance in a burgeoning advanced services market. The *ASCENT*  
13 decision therefore affirms the necessity of a significant potential market-entry mechanism  
14 that must be shown to be available and sustainable here in Arizona before a determination  
15 can be made that the local market is irreversibly open to competition and therefore that the  
16 public interest would be served by a grant of Section 271 authority to Qwest. Qwest's  
17 testimony for this workshop clearly makes no such showing.<sup>7</sup>

18  
19 <sup>7</sup> Staff's June 29, 2001 Final Report on Qwest's Compliance with Checklist Item No. 14 –  
20 Resale, concludes that as a result of the proceedings and record in the instant proceeding, "Qwest's  
21 provision of resale services is undisputed absent resolution of the two-impasse issue[s] *sic.*"  
22 *ASCENT* does not here except to Staff's conclusions regarding Qwest's provision of resold  
23 services as addressed in the record. *ASCENT* notes, however, that the recent Court of Appeals for  
the D.C. Circuit June 26, 2001 affirmation of the *ASCENT* decision raises the need for the  
Commission to specifically address Qwest's failure to provide evidence of its advanced services  
resale provisioning, now pursuant to the *ASCENT* decision, before Qwest can be deemed to be  
compliant with Checklist Item 14.

1           **6. The Key Conditions for Competition are not yet in Place in**  
2           **Arizona.**

3           Qwest's conclusion that it has met the public interest standard is at least grossly  
4 premature. The three main conditions for competition – OSS, a Performance Assurance  
5 Plan, and cost-based pricing for unbundled network elements and interconnection – are not  
6 even in place yet, much less functioning smoothly over a sustained period of time.

7           • **OSS.** OSS testing procedures have not been completed and final test and audit  
8 results have not been released. Additionally, even once released, the audit and test results  
9 for Arizona must be reviewed on the record in this docket. Further, even a successful OSS  
10 test, without a subsequent demonstration of actual commercial experience of CLECs in  
11 using such systems under each of the three modes of competitive entry contemplated under  
12 the Act, is not enough for the Commission to be able to make a finding that Qwest's OSS  
13 systems will function adequately on a day-to-day basis, and that CLECS are treated at  
14 parity, under competitive conditions and at commercial volumes over a sustained period of  
15 time. In this regard, the FCC's 271 decisions have emphasized that competitors must have  
16 access to *all* processes, including interface and legacy systems, to accomplish *all* phases of  
17 a transaction: pre-order, order, provisioning, repair and maintenance, and billing; and that  
18 in order to meet the requirements of the Telecommunications Act, such systems must be  
19 operationally ready and sufficiently available to meet the likely demand in volume and in a  
20 manner that does not discriminate against or place competitors at a disadvantage.

21           Again, *ASCENT* emphasizes that it is the *actual* provision of OSS, under conditions  
22 of competition (present compliance), which must be demonstrated by Qwest. Qwest  
23 clearly has not done so. This Commission therefore cannot make a finding that market-  
opening conditions are in-place, much less irreversible.

          • **Performance Assurance Plan.** A Performance Assurance Plan that can detect  
discrimination and that contains penalties that can effectively elicit desired behavior also is  
not yet in place in Arizona. Although a plan is being developed and revised, it has not yet

1 been endorsed by the Commission or implemented by Qwest. *See, e.g., Qwest's*  
2 Submission of Revised Performance Assurance Plan, Docket No. T-00000A-97-238, July  
3 6, 2001. It is well-established that a critical component of a Section 271 public interest  
4 analysis is a demonstration that the ongoing performance of the BOC in supplying OSS,  
5 interconnection, resale (now including advanced services resale), and UNEs must be  
6 subject to monitoring and enforcement. As with Qwest's OSS systems, even if the  
7 Commission's PAP proceeding was completed, a PAP plan is not enough to demonstrate  
8 that irreversible market opening conditions exist. To the contrary, *ASCENT* submits that a  
9 fully developed PAP must be in place for at least 3-4 months, and Qwest must be shown to  
10 be in statistical sustained compliance with the plan, before this Commission can find that  
11 the public interest supports a grant of Qwest's 271 application.

12 • **Cost-Based Rates.** This Commission is still in the process of determining final  
13 cost-based prices for all interconnection, UNEs, and ancillary services covered under  
14 Qwest's SGAT. The Commission is currently holding hearings on most of those rates.  
15 Switching rates will not be addressed until later this year. The date for a final decision by  
16 the Commission on such rates clearly is not known and cannot be predicted with any  
17 certainty. Moreover, it also is not known when hearings will be scheduled for rates and  
18 cost support for other new services that are not being addressed in the August hearings.  
19 Clearly, under the express statutory language of Sections 251 and 271 of the Telecommuni-  
20 cations Act, the existence of final and cost-priced UNE pricing is a critical component in  
21 any finding of Section 271 compliance. *See In the Matter of Application by Bell Atlantic*  
22 New York for Authorization Under Section 271 of the Communications Act to Provide In-  
23 Region, InterLATA Service in the State New York, Memorandum Opinion and Order, CC  
Docket No. 99-295, FCC 99-404 (Dec. 22, 1999) at para. 237 (hereafter "*FCC BANY*  
*Order*"). Again, until such final prices exist in Arizona, the conditions for effective and  
sustainable local competition likewise do not exist.

The above demonstrates that a stable set of market opening conditions does not yet exist in Arizona, much less that such conditions have been available in Arizona on a long-term basis. Therefore, this Commission cannot find that, based on current market conditions, the public interest will be served by a grant of Section 271 authority to Qwest.

## CONCLUSION

Throughout this proceeding parties have stressed that in order for Qwest to be granted entrance into the in-region interLATA market long distance market, Qwest must support its application with evidence demonstrating its *present* compliance with the statutory conditions for entry. Far from meeting this established standard, Qwest has continued to rely, almost exclusively, on the *theoretical or promised availability* of interconnection, network elements, and services, as its "evidence" of compliance. Consistent with its general approach, Qwest's assertion of compliance with the Act's requirement that Qwest demonstrate that the public interest will be served by a grant of 271 authority continues to rely essentially on promises of future benefits once 271 authority has been granted, rather than a demonstrated showing that the local market has been irreversibly open to competition. As it has done in the workshops on checklist compliance, Qwest continues to point to its Statement of Generally Available Terms and Conditions ("SGAT"), as dispositive of the availability of unbundled network elements ("UNEs"), resale, interconnection, and other services and facilities, yet offers scant evidence that competitors *currently* are able to receive such services on a nondiscriminatory basis from Qwest.<sup>8</sup>

---

<sup>8</sup> *ASCENT* continues to be concerned that Qwest still is primarily using this docket as a means to negotiate provisions of its SGAT. While *ASCENT* does not dispute the value of the collaborative process, the resolution of disputed SGAT provisions nevertheless fails to demonstrate Qwest's compliance with the Act any more than will a resolution of disputed SGAT provisions engender greater competition. Further, *ASCENT*, as well as the majority of smaller carriers, lacks the resources to participate in protracted SGAT negotiations. The resulting SGAT will in any event not be fully reflective of the interests of smaller competitive companies.

Qwest's interpretation of its public interest obligations entirely misses the mark. Availability connotes merely *potential*, while provision *actualizes* that potential. The fact that competitors may be able to obtain UNEs, or collocations, or resold services, even if hypothetically under an ideal interconnection agreement, SGAT, or tariff, is not enough. Availability alone does not guarantee, for example, that UNEs will be provisioned correctly, provisioned on a timely basis, or properly billed, especially over a sustained period of time and at commercial volumes. Similarly, Qwest's data as to the number of UNEs that are being provided, or customers that are being served by CLECs, likewise does not demonstrate that the UNEs were provisioned correctly, or on a timely basis, or billed properly. Further, availability does not demonstrate that Qwest meets its obligations for the provision of advanced services. It is for these reasons that independent third party OSS testing, performance measurements, and actual performance over a sustained period of time are absolutely critical determinants of whether any regional Bell operating company has met the Act's prerequisites for in-region interLATA market entry, including the public interest standard.

Ultimately, Qwest must meet its burden to demonstrate that it has met its statutory obligations through factual evidence including the results of third party OSS testing and statistically measured, sustained performance.<sup>9</sup> *ASCENT* maintains that Qwest has failed to provide any semblance of evidence that the public interest will be served by its entry into the in-region long distance market. *ASCENT* urges the Commission to find that Qwest

Nevertheless, even if a "perfect" SGAT, which was acceptable to all parties, could result from this collaborative process, Qwest would be no closer to demonstrating actual compliance with the Act and the public interest standard than it is now.


<sup>9</sup> "We find that Bell Atlantic demonstrates that it is providing nondiscriminatory access to its OSS ordering functions for unbundled network elements (*i.e.*, UNE-loop and UNE-platform). We note that Bell Atlantic supports its application with Carrier-to-Carrier performance data, which aggregates UNE-loop and UNE-platform data, and the New York Commission based its initial comments on this aggregated data." *FCC BANY Order* at para. 164 [footnote omitted].

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1 has not met the statutory standard of Section 271(d)(3) of the Telecommunications Act.

2  
3 Dated: July 25, 2001.

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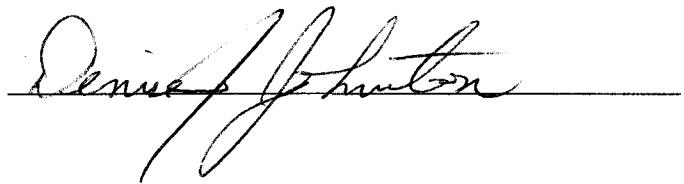
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## FINANCIAL ANALYSIS

**Decline in market capitalization for CLECs and Wholesale providers (Category 1)**  
**December 31, 1999 to April 23, 2001**

	COMPANY	CHANGE IN MARKET CAP	% CHANGE
1	Advanced Radio Telecom Corp.	\$ (671,232,000)	-100.0%
2	Convergent	\$ (454,691,750)	-100.0%
3	E.spire	\$ (297,308,213)	-100.0%
4	ICG	\$ (895,518,750)	-100.0%
5	NorthPoint	\$ (590,232,000)	-100.0%
6	WinStar	\$ (6,293,910,000)	-100.0%
7	CoreComm	\$ (2,272,163,940)	-99.3%
8	Teligent	\$ (3,225,250,990)	-99.2%
9	Rhythms	\$ (2,358,818,570)	-98.5%
10	Network Access	\$ (1,455,879,200)	-97.4%
11	Covad	\$ (5,092,290,540)	-96.2%
12	XO	\$ (21,035,186,250)	-94.5%
13	Mpower	\$ (1,655,831,750)	-93.6%
14	RCN Corp.	\$ (3,438,536,190)	-91.9%
15	DSL.net, Inc.	\$ (766,029,353)	-90.9%
16	Adelphia	\$ (3,018,455,740)	-90.6%
17	Net2000	\$ (810,360,150)	-90.6%
18	Z-tel	\$ (1,139,292,100)	-89.3%
19	Metromedia Fiber Networks	\$ (20,206,149,523)	-88.1%
20	CTC Comm.	\$ (995,923,270)	-87.8%
21	Pac-West	\$ (822,203,800)	-87.7%
22	Electric Lightwave	\$ (816,273,470)	-86.8%
23	NetworkPlus	\$ (979,484,070)	-85.1%
24	US LEC	\$ (752,198,180)	-84.8%
25	McLeodUSA	\$ (23,073,189,055)	-82.9%
26	Allegiance	\$ (7,355,564,550)	-81.9%
27	ITC DeltaCom	\$ (1,306,396,125)	-79.4%
28	FiberNet	\$ (300,686,625)	-76.7%
29	Focal Comm.	\$ (1,101,644,765)	-75.2%
30	Choice One	\$ (499,530,300)	-63.9%
31	Intermedia	\$ (1,249,108,138)	-58.4%
32	Optelecom	\$ (4,311,250)	-52.4%
33	Cox	\$ (6,794,000,500)	-21.8%
34	Time Warner	\$ (606,882,060)	-11.6%
35	Cablevision	\$ (893,720,500)	-6.8%
	<b>CLEC &amp; WHOLESALE SUPPLIERS</b>	<b>\$ (122,332,734,915)</b>	<b>-68.8%</b>

**Decline in market capitalization for RBOCs (Category 2)**  
**December 31, 1999 to April 23, 2001**

	COMPANY	CHANGE IN MARKET CAP	% CHANGE
36	Qwest	\$ (24,171,892,240)	-28.2%
37	SBC	\$ (34,504,732,000)	-20.6%
38	BellSouth	\$ (11,404,868,430)	-13.0%
39	Verizon	\$ (8,731,037,000)	-5.8%
	<b>RBOCS</b>	<b>\$ (78,812,529,670)</b>	<b>-16.0%</b>

**Decline in market capitalization for Major IXC's (Category 3)**  
**December 31, 1999 to April 23, 2001**

	COMPANY	CHANGE IN MARKET CAP	% CHANGE
1	Williams Communications	\$ (11,425,918,600)	-85.2%
2	Level 3 Communications	\$ (25,157,193,250)	-82.9%
3	Global Crossing	\$ (30,081,852,500)	-75.3%
4	Sprint	\$ (40,062,140,460)	-68.1%
5	WorldCom	\$ (96,757,337,250)	-64.1%
6	AT&T	\$ (79,783,364,683)	-49.1%
	<b>MAJOR IXC's</b>	<b>\$ (283,267,806,743)</b>	<b>-62.1%</b>